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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARGIE LUNA, Plaintiff and Appellant, v. MONTEREY PARK PETROLEUM, INC. et al., Defendants and Respondents.	H042290 (Santa Clara County Super. Ct. No. 113CV250968)

In this premises liability action, the trial court granted defendants' motion for summary judgment on the ground that they did not owe a duty of care to plaintiff. We conclude otherwise. The general rule regarding a property owner's duty—using reasonable care to avoid exposing others to harm on the property—applies to this situation. We will therefore reverse the judgment.

Plaintiff Margie Luna was injured when she slipped and fell at a gas station owned by defendants. Walking back to her car after buying ice at the station convenience store, she slipped on runoff from the onsite carwash. Water from the carwash had accumulated on the path she took toward the parking area. Plaintiff sued for negligence and premises liability.

Defendants moved for summary judgment on the sole theory that under the circumstances they did not owe a duty of care to plaintiff. Defendants argued that they were entitled to judgment as a matter of law because they had no duty to warn plaintiff about the accumulated water given its open and obvious nature, nor did they have a duty

to remedy the condition. In opposition, plaintiff submitted evidence including a declaration from a civil engineer who is an expert in premises safety. The expert opined that the wet pavement where plaintiff slipped was a dangerous condition because the pavement was not abrasive and was significantly worn. He further opined that "it is inevitable that contaminants such as oil, soap, wax residue, mud/dirt, spills and debris will be present on the paved surface of the subject area given its proximity to gas pumps and the onsite car wash facility." The contaminants increased the danger by making the wet pavement "more slippery than if there were no such contaminants" and their presence would not have been obvious to a pedestrian. Defendants objected to those opinions as speculative because the expert did not actually test the area for contaminants. The trial court sustained the objections. It granted the summary judgment motion and entered judgment for defendants.

STANDARD OF REVIEW

We review an order granting summary judgment de novo, viewing the evidence in the light most favorable to the party opposing the motion. (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206.) "A defendant moving for summary judgment has the burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action." (*Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 945.) "If the defendant fails to make this initial showing, it is unnecessary to examine the plaintiff's opposing evidence and the motion must be denied." (*Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 326.)

DUTY OF CARE

Duty of care is an element of plaintiff's causes of action for negligence and premises liability. To prevail at trial, plaintiff must prove that defendants had a duty, the duty was breached by negligent conduct, and the breach harmed her. (*Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1619.) By statute, everyone has

a duty to use ordinary care to avoid injuring others. (Civ. Code, § 1714, subd. (a).) For a property owner, that means using due care to eliminate dangerous conditions on the property. (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1197.) The existence and scope of defendants' duty in the circumstances presented here is a question of law to be decided by the court. Where a duty exists, the remaining questions of whether defendants failed to act carefully enough to satisfy the duty and whether that caused plaintiff harm are questions for the trier of fact. (See *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 465.)

Plaintiff contends the trial court erred by sustaining the objections to the expert witness declaration and by finding defendants did not have a duty of care. She argues the court should have considered the expert's opinion that the runoff contained contaminants making it more slippery than water alone and that this would not have been apparent from looking at it. Plaintiff argues the court should have concluded from this evidence that the slippery pavement was a dangerous condition defendants had a duty to eliminate—despite acknowledging at deposition that she saw the runoff long before slipping on it. Defendants maintain the trial court correctly sustained the evidentiary objections, compelling the conclusion that plaintiff slipped only in water which she knew was present. In defendants' view, they had no duty to address a dangerous condition that was open and obvious.

We need not decide whether the trial court erred by sustaining the objections, nor by what standard we review its rulings. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 [Supreme Court has not yet determined whether a trial court's rulings on evidentiary objections in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo].) Defendants have not carried their threshold burden of showing that plaintiff cannot establish the duty element of her causes of action. Summary judgment must therefore be denied without considering the expert declaration, or any of plaintiff's

evidence at all.[1] A defendant moving for summary judgment based on the absence of duty has the burden to affirmatively negate the existence of duty. (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 849.) The evidence submitted by defendants—that plaintiff slipped in runoff from the carwash consisting only of water that she saw beforehand—does not exempt defendants from the general rule requiring reasonable care in the management of property to avoid causing injury to another.

When a dangerous condition is open and obvious, a landowner is not necessarily absolved of the responsibility to act reasonably to avoid harming others. It may mean that the landowner need not warn of the presence of the condition, since the obviousness of the condition would itself serve as a warning. (See *Martinez v. Chippewa Enterprises, Inc.* (2004) 121 Cal.App.4th 1179, 1184.) But finding no obligation to warn does not end the duty inquiry, because the duty to warn is not coextensive with the duty of due care. A duty to use reasonable care to *remedy* the danger still exists, unless an injury is unforeseeable. (*Ibid.*; see also *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121–122 [when it is foreseeable the condition might cause injury despite its obviousness, there is a duty to remedy it; cases holding otherwise are "veritable shoals in the murky sea of duty"].) Although plaintiff saw the water before slipping, it does not follow that defendants owed her no duty whatsoever.

Defendants argue, based on the principles expressed in *Rowland v. Christian* (1968) 69 Cal.2d 108, that public policy dictates no duty should be imposed here. The Supreme Court in *Rowland* instructed that "in the absence of a statutory provision

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[1] Because a similar evidentiary issue could arise on remand, we observe that the fact the expert did not test for contaminants does not alone render the opinion inadmissible. That there would be soap or other contaminants on pavement near a carwash strikes us as a reasonable inference to be drawn from the evidence and an assumption that "reasonably may be relied upon by an expert in forming an opinion." (Evid. Code, § 801, subd. (b).) Not testing the pavement to confirm the presence of contaminants is a relevant consideration in determining the *weight* to give the opinion, but does not preclude admissibility.

declaring an exception to the fundamental principle [regarding duty] enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy." (*Id.* at p. 112.) The Court went on to identify seven major considerations that should be balanced in determining whether a departure from the general rule of duty is warranted: foreseeability of harm to the plaintiff; the degree of certainty that plaintiff suffered injury; the connection between defendant's conduct and the injury; any moral blame attached to defendant's conduct; the policy of preventing future harm; the extent of the burden to defendant and consequences to the community of imposing a duty; and the availability, cost, and prevalence of insurance for the risk involved. (*Id.* at pp. 112–113.)

Those factors are not to be mechanically applied, in the sense that each must come out favorably to the plaintiff before a duty is imposed; rather, they are guideposts for navigating the legal determination of whether policy concerns justify making an exception to the statutory duty of reasonable care. Foreseeability of the injury and burden to the defendant are the crucial considerations in the analysis. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213.) Courts therefore often decide the issue of duty by "considering the foreseeability of the injury balanced against the burden of protecting against that injury." (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 282.) Whatever calculus is used, the ultimate goal is to promote sound policy: it is good policy to require a landowner to take reasonable measures to avoid harming the public when the risk of an injury is high and the effort needed to prevent it is modest; in the same vein, it is not productive to require a landowner to take difficult measures to protect against a risk that is slight.

There is no close question here in applying the general duty of care ordinarily imposed on property owners. It is eminently foreseeable that water flowing into an area used by pedestrians could cause someone to slip and fall. Defendants argue that guarding against that risk imposes an excessive burden, asserting that carwash owners "would

either have to hire someone to monitor the exit area on a 24[-]hour continual basis, or pull an existing employee from their regular duties to mop up the exit area after each wash. Such measures would increase the possibility of closing the car wash permanently rather than incur the expense of hiring additional personnel." That overstates their case. Defendants focus on two inefficient means of addressing the problem, but do not explain why it would be infeasible to improve drainage, or to erect temporary or permanent barriers to keep pedestrians away from areas affected by runoff.

None of this means defendants were negligent—perhaps the efforts they made to prevent injury were reasonable. That is for a jury to decide. Whether defendants breached the duty of reasonable care in managing their property is an issue separate from whether they have the duty to begin with. The trial court's finding of no duty was error.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to vacate the order granting defendants' motion for summary judgment and to enter a new order denying the motion. Plaintiff shall recover costs on appeal.

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Grover, J.

WE CONCUR:

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Elia, Acting P. J.

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Danner, J.